STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ANGEL MERCADO
and KELLY MERCADO,
Husband and Wife,

Plaintiffs,

vs. Case No. 2002-3011-NO

MELISSA FAYE LAHUIS
and SHARON MARY KOWALCZYK,
and ALMA ENTERPRISES L.L.C.,
d/b/a Tim Horton's, Jointly and Severally,

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on a motion for summary disposition, pursuant to MCR 2.116(C)(10), by Melissa Faye Lahuis ("Lahuis") and Sharon Mary Kowalczyk ("Kowalczyk").

I.

On or about July 20, 2001, at approximately 3:10 P.M., plaintiff and his wife had been riding their bicycles through the parking lot of Tim Horton's premises. He had turned into the parking lot by riding his bicycle in the wrong direction through the drive-thru lane, against the flow of traffic. As he rounded the curve of the drive-thru lane, he collided with a vehicle that was operated by Lahuis and registered to Kowalczyk. The impact caused him to fall to the ground and sustain injuries to his left leg as well as damage to his bicycle. Moreover, the windshield and hood of the subject vehicle were damaged. It is unclear as to whether Lahuis had applied her brakes immediately prior or subsequent to the collision. According to the police, the

shrubbery and dumpster prevented Lahuis from seeing plaintiff's bicycle until the instant of the impact.

Plaintiff sought noneconomic damages, as well as economic damages for medical expenses and lost earnings. Lahuis and Kowalczyk moved for summary disposition, asserting that plaintiff had been more than 50% at fault and was therefore precluded from recovering under the doctrine of comparative negligence. They also maintained that liability should not attach by virtue of the sudden emergency doctrine.

This Court granted defendants' motion in its entirety, after which plaintiff appealed such decision. Inasmuch as the hearing was never video recorded, there was no transcript available. Further, plaintiff failed to timely file a settled statement of the facts, as required under MCR 7.210(B)(2). Notwithstanding, the Court of Appeals considered the appeal insofar as transcripts were not pertinent to the issues raised.

The Court of Appeals first determined that the dismissal of plaintiff's claim for noneconomic damages on the ground of comparative negligence had been proper. However, it was held that this Court had improperly dismissed the claim for economic loss inasmuch as comparative negligence did not apply thereto. In the absence of a transcript, the Court of Appeals was unable to ascertain whether this Court had considered the sudden emergency doctrine.

Accordingly, the matter was partially reversed and remanded. More specifically, this Court was instructed to determine whether the sudden emergency doctrine applied to absolve defendants of liability. The appellate court also indicated that if there is no genuine issue of material fact regarding the applicability of said doctrine, plaintiff's claim for economic damages may be dismissed on that basis.

Lahuis and Kowalczyk presently argue that the evidence demonstrates that the situation created by plaintiff's improper use of the drive-thru lane constituted a sudden emergency. However, plaintiff disputes such position.

II.

In reviewing a motion brought under MCR 2.116(C)(10), the trial court must consider the pleadings, as well as any affidavits, depositions, admissions, and documentary evidence submitted by the parties. The evidence should be construed in the light most favorable to the party opposing the motion. The motion should be granted if the evidence establishes that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. MCR 2.116(G)(4)-(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). It is not sufficient for the non-movant to promise to offer factual support for his position at trial. *Smith*, *supra*, at 457-458 n 2. Instead, the adverse party must produce evidence demonstrating that there is a genuine issue of material fact. MCR 2.116(G)(4).

III.

The sudden emergency doctrine is a judicially created principle which applies to "unusual" or "unsuspected" conditions. *Vsetula v Whitmyer*, 187 Mich App 675, 680-681; 468 NW2d 53 (1991); In footnote no. 1 of its decision in the instant matter, the Court of Appeals focused on the term "unsuspected" and set forth the following definition:

> An event is "unsuspected" if: (1) the potential peril has not been in the motorist's clear view for any length of time, and (2) the potential peril was totally unexpected.

See also Farris v Bui, 147 Mich App 477, 480; 382 NW2d 802 (1985).

During his deposition, plaintiff indicated that he had no reason to dispute witness statements that he had been traveling south in the drive-thru, against the flow of traffic. *See* Angel Mercado's deposition at 47-48.

Lahuis testified that several friends had been riding in the vehicle with her at the time of the accident. *See* Melissa Faye Lahuis's deposition at 28. She had not seen plaintiff prior to the collision. *Id.* at 35. She stated that she had not been drinking or using drugs that day. *Id.* at 38. According the Lahuis, no one in the vehicle had had a cell phone and if the radio had been on, it had not been very loud. *Id.* at 29. She also indicated that she had been paying attention to where she had been driving and that she had not had anything in her hands other than the steering wheel. *Id.* at 49. In this regard, she had not yet placed her order for a drink. *Id.* at 43. Additionally, there had been nothing wrong with the vehicle mechanically. *Id.* at 49. Although she had once worked at a Tim Horton's drive-thru window, she had never seen anyone attempt to order by walking or riding a bicycle up to the window. *Id.* at 50. People who were walking or on bicycles had to get their food by going inside the restaurant. *Id.* Based on the position of her vehicle and plaintiff's position after she saw him, she opined that she could have seen him prior to the collision if it had not been for the "blind spot" created by the bushes. *Id.* at 38, 47. Moreover, Lahuis testified that she had not received a ticket as a result of the accident. *Id.* at 42, 47.

Officer Kevin Witherspoon, of the Roseville Police Department, testified that the stories of Lahuis and plaintiff's wife were similar. *See* Officer Witherspoon's deposition at 15. According to Officer Witherspoon, plaintiff had been riding his bicycle against the traffic in the drive-thru lane and when he saw Lahuis's vehicle, he tried to either avoid it or brake, neither of which he was able to do. *Id.* at 15. Plaintiff then hit the vehicle at about the same time that the

vehicle stopped. *Id.* at 15. The officer indicated that he did not have any evidence to dispute Lahuis's statement that she had been proceeding slowly through the drive-thru. *Id.* at 16. He also testified that the "blind spot" created by the dumpster and bushes created a vision obstruction for the corner. *Id.* at 19. Further, he opined that there was nothing that Lahuis could have done to avoid the impact. *Id.* at 20.

Based on the totality of circumstances, the Court is satisfied that the potential peril of plaintiff on his bicycle had not been in Lahuis's view for any length of time. *Farris, supra.* Likewise, the Court is convinced that the potential peril of plaintiff riding his bicycle the wrong way down the drive-thru lane had been totally unexpected. *Id.* The Court therefore concludes that there is no genuine issue of material fact that the sudden emergency doctrine operates to absolve Lahuis of liability. Accordingly, the instant request for relief should be granted pursuant to MCR 2.116(C)(10). *Smith, supra.* In light of this ruling, plaintiff's claim for economic damages against movants should also be dismissed.

IV.

For the reasons set forth above, Lahuis and Kowalczyk's motion for summary disposition, pursuant to MCR 2.116(C)(10), is GRANTED. Pursuant to MCR 2.602(B), a judgment shall enter that is consistent with this *Opinion and Order.* In compliance with MCR 2.602(A)(3), this decision does close the case.

IT IS SO ORDERED.

MARY A. CHRZANOWSKI

Dated: JUN 09 2006

Hon. Mary A. Chrzanowski P39944
Circuit Court Judge

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